SYARIKAT TELEKOM MALAYSIA

v.

BUSINESS CHINESE DIRECTORY SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
N.H. CHAN JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-02-435 OF 1995]
19 DECEMBER 1996

CIVIL PROCEDURE: *Trial - Affidavit evidence - Resolution of disputes thereon - Principles - Whether evidence must be plausible - Credible denial by opposing party - Absence of oral evidence or cross-examination - Duty of trial Judge - Whether must decide on undisputed facts.*

CIVIL PROCEDURE: *Trial - Affidavit evidence - Burden of proof - Prima facie credible evidence in affidavit - Whether must be rebutted - Effect of non-rebuttal thereof .*

The appellant had obtained an *ex parte* Anton Pillar order against the respondent but was unable to sustain it *inter partes*. In the ensuing inquiry into the issue of damages, which proceeded on affidavit evidence, the learned Judge ruled that the respondent had proved its losses and accordingly made an order against the appellant. In this appeal, the appellant sought to argue *inter alia* that the decision appealed against was fatally flawed, in that the respondent had not led sufficient evidence to prove the losses and that the trial Judge had found the losses claimed proved upon conflicting evidence. Before the learned appeal Judges, a question arose as to whether the trial Judge, in deciding the way he did, had applied the correct principles of law.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] The principles that govern a case of this nature, where a Court is called upon to make a determination based on affidavit evidence, are well settled. It is for the Judge to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient plausibility to merit further investigation as to their truth. If allegations are made in the affidavits, and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the Judge must ignore the disputed allegations and decide the matter by consideration of the undisputed facts.

[2] The respondent had led *prima facie* credible evidence in support of its case, and the trial Judge, having given careful consideration to the affidavit evidence, came to the conclusion that the respondent had proved its case. Upon close scrutiny of the judgment and the affidavits, we cannot find any error in the reasoning of the learned Judge and his assessment of the evidence was entirely in accordance with the principles enunciated aforesaid. The trial Judge was not influenced by any irrelevant consideration, and nor did he fail to take into account relevant considerations. There is consequently no merit in this appeal.

[3] While it is true that the burden is on a party who asserts that he has sustained damages to prove the fact, this does not absolve the opposite party from adducing evidence in rebuttal. Once, as here, evidence that is *prima facie* credible has been led by one party, it is for his opponent to lead evidence to prove that the assertions made are not correct. The appellant, however, chose not to do so and was content to sit back and merely ask the respondent to prove damages.

[4] The appellant has taken a risk in not adducing any rebuttal evidence. The consequence of taking such a risk was that the respondent's evidence would be believed by the Court. And this is what happened here. The appellant cannot therefore complain if the learned Judge, having satisfied himself of the credibility of the respondent's evidence, made the assessment he did.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Perbicaraan - Keterangan afidavit - Penyelesaian pertikaian - Prinsip-prinsip - Samada keterangan seharusnya munasabah - Penafian oleh pihak membantah yang boleh dipercayai - Ketiadaan keterangan lisan atau pemeriksaan balas - Tugas Hakim perbicaraan - Samada mesti memutuskan fakta-fakta yang tidak boleh dipertikaikan.*

PROSEDUR SIVIL: *Perbicaraan - Keterangan afidavit - Beban membukti - Prima facie keterangan yang boleh dipercayai dalam afidavit - Samada harus dipatahkan - Kesan tidak dipatahkan.*

Perayu telah mendapatkan satu perintah Anton Pillar secara *ex parte* terhadap responden tetapi tidak dapat mempertahankannya *inter partes*. Dalam siasatan yang sedangkan dijalankan terhadap isu gantirugi, yang mana telah diteruskan atas keterangan afidavit, Hakim yang bijaksana telah memutuskan bahawa responden telah membuktikan kerugiannya dan berikutan itu telah membuat satu perintah terhadap perayu. Dalam rayuan ini, perayu telah berusaha untuk

berhujah antara lainnya bahawa keputusan terhadap mana dirayui adalah sungguh cacat, iaitu responden telah tidak mengemukakan keterangan yang mencukupi untuk membuktikan kerugian itu dan bahawa Hakim perbicaraan telah mendapati kerugian yang dituntut itu dibuktikan pada keterangan yang bercanggahan. Di hadapan Hakim rayuan yang bijaksana, satu persoalan telah berbangkit berhubung dengan samada Hakim perbicaraan, dalam memutuskan sepertimana yang telah dilakukan olehnya, telah memakai prinsip-prinsip undang-undang yang betul.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Prinsip-prinsip yang menguasai kes yang bersifat seperti ini, di mana sebuah Mahkamah dipanggil untuk membuat suatu penentuan berdasarkan keterangan afidavit, adalah tetap. Ianya adalah terpulang kepada Hakim untuk menentukan pada awalnya samada pernyataan-pernyataan yang terkandung dalam afidavit terhadap mana ianya bergantung sebagai membangkitkan satu konflik keterangan di atas fakta yang relevan boleh dipercayai sehinggakan mewajarkan siasatan yang selanjutnya berhubung dengan kebenarannya. Jika pengataan-pengataan dibuat dalam afidavit-afidavit, dan pengataan-pengataan itu dengan cara yang boleh dipercayai telah dinafikan oleh afidavit-afidavit respondent maka dalam ketiadaan keterangan lisan atau pemeriksaan balas, Hakim mestilah tidak menghiraukan pengataan-pengataan yang dipertikaikan dan memutuskan perkara tersebut dengan mempertimbangkan fakta-fakta yang tidak dipertikaikan.

[2] Responden telah mengemukakan keterangan *prima facie* yang boleh dipercayai bagi menyokong kesnya, dan Hakim perbicaraan, selepas mempertimbangkan keterangan afidavit dengan teliti, berkeputusan bahawa responden telah membuktikan kesnya. Setelah meneliti penghakiman dan afidavit-afidavit tersebut, kami tidak dapat mengesan apa-apa kesilapan dalam alasan-alasan Hakim yang bijaksana dan taksiran beliau berhubung dengan keterangan tersebut adalah secara keseluruhannya menurut prinsip-prinsip yang disebut di atas. Hakim perbicaraan telah tidak dipengaruhi oleh mana-mana pertimbangan yang tak relevan. Akibatnya tidak terdapat apa-apa merit dalam rayuan ini.

[3] Sementara ianya benar bahawa bebanan adalah terletak pada pihak yang menegaskan bahawa beliau telah mengalami gantirugi untuk membuktikan fakta tersebut, ini namun begitu tidak membebaskan pihak yang bertentangan daripada mengemukakan keterangan bagi mematahkannya. Sebaik sahaja, sepertimana keadaannya di sini, keterangan yang secara *prima facie* boleh dipercayai telah dikemukakan oleh satu pihak, ianya terpulang kepada pihak lawannya untuk mengemukakan keterangan untuk

membuktikan bahawa penegasan-penegasan yang telah dibuat adalah tidak betul. Perayu, namun begitu, memilih untuk tidak melakukan sedemikian dan berpuashati hanya dengan menanti dan cuma meminta responden untuk membuktikan gantirugi.

[4] Perayu telah mengambil risiko dalam tidak mengemukakan apa-apa pematahan. Akibat mengambil risiko yang sedemikian adalah bahawa keterangan responden akan dipercayai oleh Mahkamah. Dan inilah yang telah berlaku di sini. Perayu dengan itu tidak boleh mengadu jika Hakim yang bijaksana, setelah memuaskan hatinya mengenai kesahihan keterangan responden, telah membuat taksiran sepertimana yang dilakukannya.

[Rayuan ditolak.]

Cases referred to:

Syarikat Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd. [1994] 2 CLJ 729 ***(cit)***

Choo Kim San v. Malaysia Borneo Finance Corpn. (M) Bhd. [1976] 1 MLJ 37 ***(cit)***

Hartecon JV Sdn. Bhd. v. Hartela Contractors Ltd. [1996] 2 MLJ 57 ***(refd)***

Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin [1984] 1 MLJ 160 **(foll)**

Tay Bok Choon v. Tahansan Sdn. Bhd. [1987] 1 MLJ 433 ***(foll)***

For the appellant - M. Nagarajah (C.M. Teng with him); M/s. Shook Lin & Bok
For the respondent - Y.S. Leong; M/s. Low Hop Bing, Koh Kong & Assoc.

JUDGMENT

Gopal Sri Ram JCA:

The appellant in this case, having obtained an Anton Pillar order *ex parte* against the respondent, was unable to sustain it *inter partes*. The learned Judge who set aside the order directed an inquiry into damages that may have been sustained by the respondent pursuant to the undertaking that had been given by the appellant when it obtained the Anton Pillar injunction. The appellant's appeal against the discharge of the order was dismissed by the Supreme Court. See, *Syarikat Telekom Malaysia Bhd. v. Business Chinese Directory Sdn. Bhd.* [1994] 2 CLJ 729; [1994] 2 MLJ 420. The learned Judge then proceeded to conduct an inquiry into the issue of damages. The facts relevant to this part of the case appear sufficiently in his judgment and we find it unnecessary to reproduce them here.

The respondent supported its case by way of affidavit evidence. The appellant then applied by a summons returnable in Chambers for leave to cross-examine the deponent of the respondent's affidavit. This was in accordance with the procedure laid down by Mohamed Azmi J (as he then was) in *Choo Kim San v. Malaysia Borneo Finance Corpn. (M) Bhd.* [1976] 1 MLJ 37.

The learned Judge refused the application to cross-examine. It was then open to the appellant to appeal against the refusal. The appellant did not, however, do that. Instead, it filed a notice of intention to cross-examine, but quite rightly did not go forward on that notice. We say "quite rightly" because the learned Judge having refused the summons to cross-examine, it was not open to him to review that decision. (See, *Hartecon JV Sdn. Bhd. v. Hartela Contractors Ltd.* [1996] 2 MLJ 57.) So, the hearing proceeded on affidavit evidence.

The principles that govern a case of this nature, where a Court is called upon to make a determination based on affidavit evidence, are well-settled and free from any doubt. In *Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin* [1984] 1 MLJ 160, 163, Lee Hun Hoe CJ (Borneo), when delivering the judgment of the former Federal Court, said:

> Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet Judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible. As Lord Diplock said in *Eng Mee Yong's* case (*Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212) at p. 217:
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> > ... In making such order on the application as he 'may think just' the Judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth. Since it is a matter upon which the opinions of individual Judges may reasonably differ, an appellate Court ought not to interfere with the Judge's exercise of his discretion under s. 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong ...

In *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ 433, 436, Lord Templeman said:

> At the end of the day the Judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the Judge must ignore the disputed allegations. The Judge must then decide the fate of the petition by consideration of the undisputed facts.

Now, the observations in the foregoing cases although made in other contexts – the first in the context of the removal of a caveat and the second in the context of a petition to wind up a company – are of general application and are not in any way to be treated as restricted to the circumstances of the particular case.

In the present case, the learned Judge having given careful consideration to the affidavit evidence before him came to the conclusion that the respondent had proved its losses. His findings were attacked before us. Counsel submitted that the appellant had, in its evidence, denied the several matters raised by the respondent in the affidavit filed on its behalf. It was also submitted that the learned Judge failed to ignore the areas of conflict but found the losses claimed proved upon conflicting testimony. The appellant further complained that the appellant had failed to lead sufficient evidence to prove the losses which were allegedly suffered in consequence of the injunction.

With respect, we are unable to agree with the submissions made on the appellant's behalf. Having subjected the judgment appealed against and the affidavits delivered by the parties to close scrutiny, we are unable to detect any error in the reasoning of the learned Judge. We find his assessment of the evidence to be entirely in accordance with the principles enunciated in the cases to which we have earlier referred. We are further satisfied that he was not influenced by any irrelevant consideration: nor did he fail to take into account relevant considerations.

The appellant's complaints overlook at least two important matters.

First, the respondent had led *prima facie* credible evidence in support of its case. That evidence was neither inherently improbable nor inherently incredible. The respondent had made available all the material in support of its claim to the appellant whose sole complaint in this respect is that the evidence in question is unsatisfactory. While it is true that the burden lies upon a party who asserts that he has sustained damages to prove the fact, this does not absolve the opposite party from adducing any evidence in rebuttal.

Once, as here, evidence that is *prima facie* credible has been led by one party, it is for his opponent to lead evidence to prove that the assertions made are not correct. The appellant, however, chose not to do so. It was content to sit back and merely ask the respondent to prove the damages. That is a risk the appellant was entitled to take. But the consequence of the appellant taking such a risk was that the respondent's evidence would be believed by the Court. And this is what happened here. The appellant cannot therefore complain if the learned Judge, having satisfied himself of the credibility of the respondent's evidence, made the assessment as he did. We may add, in fairness to the learned Judge in this case, that he did subject the respondent's evidence to careful scrutiny before arriving at his conclusion under each head of loss.

Secondly, the appellant's argument that no loss was ever suffered because the respondent did not have a licence to carry on its trade is not relevant because, as conceded by Mr. Nagarajah, this issue was subsumed in his client's

unsuccessful appeal to the Supreme Court. In any event, it appears that the evidence shows that the respondent did have a licence issued to it at some later point in time, and there was no suggestion by Counsel that it was not open to the respondent to canvass for orders while awaiting the issuance of the licence.

After having given due consideration to all the submissions made on the appellant's behalf, we came to the conclusion that there was no merit in the appeal. We therefore dismissed the appeal without calling upon Counsel for the respondent. The usual orders that are consequent upon a dismissal were made.

Reported by W.A. Sharif